

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

September 18, 2007 Session

**STATE OF TENNESSEE v. OLIVIA F. SWAIN**

**Appeal from the Criminal Court for Sumner County  
No. 972-2003 & 159-2004   Dee David Gay, Judge**

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**No. M2006-02736-CCA-R3-CD - Filed February 20, 2008**

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After pleading guilty to a violation of probation in Sumner County, Appellant, Olivia F. Swain, was ordered by the trial court to serve the remainder of her six-year effective sentence in incarceration. Appellant contends that the trial court's ruling was in error. Because the trial court did not abuse its discretion in revoking Appellant's probation and ordering her to serve her sentence in incarceration, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID G. HAYES, and THOMAS T. WOODALL, JJ., joined.

Jocelyn D. Mims, Hendersonville, Tennessee, for the appellant, Olivia F. Swain

Robert E. Cooper, Jr., Attorney General & Reporter; Elizabeth B. Marney, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and Thomas Dean, Assistant District Attorney, for the appellee, State of Tennessee.

**OPINION**

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Factual Background

Appellant was indicted in December of 2003 in a multi-count indictment for various crimes, including three counts of passing worthless checks in violation of Tennessee Code Annotated § 39-14-121, two counts of perjury, one count of making a false report to a law enforcement officer, and one count of failure to appear for court. Subsequently, in February of 2004, Appellant was indicted for aggravated burglary.

In April of 2004, Appellant pled guilty to the charges as listed in the indictments and received an effective six-year sentence. The trial court suspended the sentences and placed Appellant on probation. The terms of Appellant's probation were as follows: (1) "obtain GED"; (2) "pay restitution on third Friday of each month beginning 21 May 2004";<sup>1</sup> (3) "level of service inventory with mandatory compliance"; and (4) "blood test if requested by law enforcement."

In July of 2004, a violation of probation warrant was issued for Appellant's arrest due to her failure to make payments of restitution, costs, and fees. According to the warrant, Appellant had failed to "make any payments as of July 21, 2004" on the total amount of \$4,111.40. On October 13, 2004, the probation violation warrant was amended to charge that Appellants whereabouts were unknown.

Appellant was finally arrested over one year later. According to the technical record, Appellant appeared in court on June 29, 2006, for a "violation hearing." At that hearing, Appellant apparently admitted to the use of illegal drugs.<sup>2</sup> As a result, the trial court revoked Appellant's "ROR Bond" and ordered Appellant to be taken into custody.

In October of 2006, Appellant pled guilty to violating probation. The trial court set a sentencing hearing for November 27, 2006. The trial court also dismissed several outstanding warrants for failure to appear.<sup>3</sup>

At the sentencing hearing, Appellant testified that she pled guilty to the charges involving the worthless checks and aggravated burglary. Appellant acknowledged her understanding of the terms of probation and admitted that she had not complied with them. Specifically, Appellant admitted that she did not pay restitution as ordered and failed to report to her probation officer as scheduled. Appellant agreed that she had a history of failing to comply with the orders of the court. Appellant attempted to justify her behavior by informing the court that she was unable to cope with her recent diagnosis of being HIV positive. Appellant stated that she was able to work but that she lost her previous job at McDonald's when her employer found out about her health issues. On cross-examination, Appellant admitted that she wrote bad checks, lied about whether the checks were forged, and failed to appear in court. Appellant also admitted that she smoked marijuana while on bond, but claimed she was nauseous and unable to hold down food. Appellant acknowledged to the trial court that the crimes for which she pled guilty occurred prior to her diagnosis and admitted that she had been given plenty of chances in the past.

At the conclusion of the sentencing hearing, the trial court determined that Appellant had been "given a chance" but failed to comply with conditions of her probation. Specifically, the trial

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<sup>1</sup>According to the court minutes from April 15, 2004, the combined total of Appellant's restitution was \$1,573.86. This figure does not appear to include costs and fees associated with the convictions.

<sup>2</sup>There is no transcript from this hearing in the record on appeal.

<sup>3</sup>These warrants do not appear in the technical record.

court found that Appellant had violated her probation and had not done anything that she had been ordered to do, including pay restitution. Further, the trial court commented that Appellant had “been on the lam . . . for an extremely long time . . .” and used drugs while on probation. As a result of her behavior, the trial court sentenced Appellant to serve the remainder of her effective six-year sentence.

Appellant appeals the trial court’s decision ordering Appellant to serve the balance of her six-year sentence in incarceration.

### *Analysis*

On appeal, Appellant argues that the trial court “relied upon her failure to make restitution without finding the failure was willful and . . . [utilized] the record of the convictions . . . as the bases [sic] for the revocation.” Appellant also contends that the trial court should have granted some other form of alternative sentencing rather than ordering Appellant to serve the balance of her sentence in incarceration. Specifically, Appellant argues that the trial court “failed to properly perform the statutorily mandated considerations of sentencing alternatives” by first finding that Appellant violated probation and then failed to make the required findings that Appellant should be sentenced to incarceration rather than an alternative sentence. Thus, Appellant contends that this Court should review the trial court’s sentencing determination using a de novo standard of review rather than an abuse of discretion standard of review. The State argues that the record “fully supports” the trial court’s determination.

A trial court may revoke probation and order the imposition of the original sentence upon a finding by a preponderance of the evidence that the person has violated a condition of probation. See T.C.A. §§ 40-35-310 & -311; *State v. Shaffer*, 45 S.W.3d 553, 554 (Tenn. 2001). After finding a violation of probation and determining that probation should be revoked, a trial judge can: (1) order the defendant to serve the sentence in incarceration; (2) cause execution of the judgment as it was originally entered, or, in other words, begin the probationary sentence anew; or (3) extend the probationary period for up to two years. See T.C.A. §§ 40-35-308(c) & -311(e); *State v. Hunter*, 1 S.W.3d 643, 647-48 (Tenn. 1999). The decision to revoke probation rests within the sound discretion of the trial court. *State v. Mitchell*, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). Revocation of probation or a community corrections sentence is subject to an abuse of discretion standard of review, rather than a de novo standard. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). An abuse of discretion is shown if the record is devoid of substantial evidence to support the conclusion that a violation of probation has occurred. *Id.* The evidence at the revocation hearing need only show that the trial court exercised a conscientious and intelligent judgment in making its decision. *State v. Leach*, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995).

Further, when the defendant’s violation of probation is based on failure to pay restitution or fines, the trial court must determine the reasons behind the failure to pay. *State v. Dye*, 715 S.W.2d 36, 40 (Tenn. 1986). If the court finds the nonpayment results from either the defendant’s willful refusal to pay or failure to make bona fide efforts to obtain the means to pay, the defendant’s

probation may be revoked. *Id.* However, if the trial court finds that the nonpayment results from a genuine inability to pay, the court may not revoke the defendant's sentence and order incarceration unless alternative measures are inadequate to meet the State's interests in punishment and deterrence of crimes. *Id.*

After a review of the record, we conclude that the trial court was presented with ample evidence establishing that Appellant violated the terms of her probation and, as a result, properly ordered her to serve her sentence in incarceration. Specifically, Appellant testified that she failed to report to her probation officer, failed to pay restitution as ordered by the trial court, her whereabouts were unknown for nearly two years and she smoked marijuana, all while on probation. In fact, Appellant even specifically admitted that she violated her probation and does not dispute that admission on appeal. As to Appellant's argument that the trial court based the violation of probation solely on her failure to pay restitution, our review of the record indicates that the trial court indeed failed to specifically determine on the record whether Appellant's failure to pay restitution was willful. Nonetheless, the trial court's order revoking probation was not based solely on the failure to pay restitution. We find that the trial court did not abuse its discretion by revoking Appellant's probation. "[T]he trial court exercised a conscientious and intelligent judgment in making its decision." *Id.* Therefore, Appellant is not entitled to relief on appeal.

#### *Conclusion*

Based on the foregoing authorities and reasoning, we affirm the order of the trial court revoking Appellant's probation and ordering that her original sentence be served in incarceration.

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JERRY L. SMITH, JUDGE